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INTEREST OF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court, amici **Learning Disabilities Association of America and Advocacy, Incorporated** file this brief in support of Respondents Shannon and Emory Carter. Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

Learning Disabilities Association of America was formed 30 years ago because of the recognition among parents and professionals that students with this "hidden handicap" were facing increased problems as our society placed greater emphasis on learning. The LDAA now has over 50,000 members in 50 state affiliates and over 700 local chapters. The membership, composed of individuals with learning disabilities, family members, and concerned professionals, advocates for the over two (2) million students of school age with this disability. One-half of all students with disabilities in America's schools are learning disabled, as is the student who is the subject of the instant case.

LDAA has a professional advisory board of distinguished scientists and practitioners in education, medicine, social services, law and other fields directly related to learning disabilities. **LDAA** and its state affiliates and local chapters work directly with school systems in planning and implementing programs for early identification and diagnosis of this disability as well as programs for remediation in regular classes, resource rooms and other special settings. **LDAA** produces a professional journal, *Learning Disabilities: A Multidisciplinary Journal.*

Advocacy, Incorporated is one of the "protection and advocacy" systems created by Congress in Section 113 of Public Law 94-103, The Developmentally Disabled Assistance and Bill of Rights Act (1975), 42 U.S.C. Sec. 6042, as amended. Advocacy, Inc. has operated as the Texas agency to protect the rights of persons with developmental disabilities for over fifteen (15) years. In that capacity, Advocacy, Inc. has worked with thousands of citizens with

disabilities and has represented many of them in court, including residents of a group home for adults with mental retardation in *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 373 (1985), and a student who needed school health services in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).

Advocacy, Inc. served as amicus curiae in *Alamo Heights ISD v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986); *Detsel v. Ambach*, 637 F. Supp. 1022, (N.D.N.Y. 1986), *aff'd*, *Detsel v. Board of Education of Auburn*, 820 F.2d 587, (2d Cir. 1987), *cert. denied* 108 S.Ct. 495 (1987); *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990); *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 175 (1991); *Schuldt v. Mankato Independent School District No. 77*, 937 F.2d 1357 (8th Cir. 1991); and *Rapid City School District 51/4 v. Vahle*, 733 F. Supp. 1364 (D.S.D. 1990), aff'd 922 F.2d 476 (8th Cir. 1990). Advocacy, Inc.'s representation of people with disabilities in these actions and others has served to benefit students with disabilities who are entitled to a free appropriate public education.

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case and the statement of facts as detailed in the brief of Respondents.

SUMMARY OF ARGUMENT

Congress recognized that disputes between school districts and parents would arise with regard to appropriate education, and provided that these disagreements would be the subject of due process procedures. While the administrative hearing officer or the trial court is considering the dispute, the student with a disability must remain in the current educational placement. If that is intolerable to the parents, they may choose to make a unilateral placement at their own expense and seek reimbursement from the school district. This Court adopted a rule in *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts* which fairly balances the interests of the parties where the parents feel compelled to take such action.

Requiring a public school to reimburse parental expenses for a unilateral placement at a private school does not work an undue burden on the local educational agency or the state. There are steps available to the state and local educational agencies to stop the flow of dollars to the private service provider or to mitigate the damages. The local school and state agency in this case did not avail themselves of these options.

I. THE SUPREME COURT RULE IN *BURLINGTON* FAIRLY BALANCES THE INTERESTS OF THE PARTIES AND IS NECESSARY TO ASSURE THAT AN APPROPRIATE EDUCATION, AS DEFINED BY THE SUPREME COURT IN *ROWLEY*, IS MADE AVAILABLE TO THE STUDENT.

The basic purpose of the Individuals with Disabilities Education Act, or IDEA (previously called the Education of the Handicapped Act) is to assure an offering of a free appropriate public education to every eligible student with a disability.[1] Such an offering must follow certain steps and includes parental participation.[2] This Court recognized that there would not always be a consensus between the school officials and the parents and noted that Congress had developed procedural safeguards to resolve substantive disagreements.[3] One of those disagreements is predictably that the public school offering is viewed by the parents as so inadequate that they feel compelled to purchase services privately for their child. This Court recognized that both Congress and the Executive Branch contemplated,

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[1] 20 U.S.C. § 1400(c) (Supp. 1993); *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 367 (1985).

[2] 20 U.S.C. § 1415a (Supp. 1993); 34 C.F.R. § 300.501-514.

[3] *Burlington*, 471 U.S. at 368.

and provided for, that eventuality.[4] Such a dispute has arisen in this case.

A. Was An Appropriate Offering Made By The Public School?

The *Burlington* test first asks whether the public school offered an appropriate program. In *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley* this Court ruled that for a school district to offer an appropriate program it not only must comply with the Act's procedures, but that the Individualized Education Program (IEP) must be reasonably calculated to confer educational benefit.[5] This Court said further that the IEP must be "individualized,"[6] "personalized,"[7] "tailored,"[8] and "specially designed"[9] to meet the "unique needs"[10] of that one child. Without such personalization an IEP cannot be reasonably calculated to confer benefit.

(1) The Role of Evaluation in an Appropriate Offering

How does the school determine the unique needs to be addressed on an IEP? The school is required to assess those needs through a process of identification and evaluation. Learning disabled students, such as Shannon Carter, are at a unique disadvantage in this identification and evaluation process because they are often thought of not as being "disabled" but rather as lazy students who are not trying hard enough. When Congress enacted the Education for All Handicapped Children Act in 1975 it defined specific learning disability.[11] Congress realized then

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[4] *Burlington*, 471 U.S. at 371, quoting 1975 U.S. Code Cong. & Admin. News, pp. 1425, 1456 and the regulations at 34 C.F.R. § 3[illegible]403(b).

[5] 458 U.S. 176, 207 (1982).

[6] *Rowley*, 458 U.S. at 201.

[7] *Rowley*, 458 U.S. at 197, 203 and 210.

[8] *Rowley*, 458 U.S. at 181.

[9] *Rowley*, 458 U.S. at 188, 201.

[10] *Rowley*, 458 U.S. at 181, 188.

[11] 20 U.S.C. § 1401(a)(15).

how difficult it was to define learning disability and directed the Commissioner of Education to fully explain through regulations what evaluation must be performed when a school considers whether a student is learning disabled.[12] The resulting regulations[13] emphasize how careful public schools must be when they identify, evaluate and design programs for students with learning disabilities.

In Shannon's case, the school district failed to identify the learning disability in its first try at evaluation. The school district told Shannon's parents that their daughter could do the work if she wanted to but that she lacked motivation.[14] As a result of Florence County's determination, Shannon was treated like many children, as noted in *Rowley*, "left to fend for themselves in classrooms designed for the education of their nonhandicapped peers."[15] Shannon's parents assumed she was not trying and disciplined her at home for her bad grades.[16]

To assure that this important distinction is made between a child who is merely unmotivated and a student who truly has a disability which warrants special services, Congress and the Executive Branch expected school districts to follow the detailed procedures for evaluating for

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[12] See 42 Fed. Reg. 65081 (Dec. 29, 1977).

[13] Now published at 34 C.F.R. § 300.540-543 as "Additional Procedures for Evaluating Children with Specific Learning Disabilities."

[14] Joint Appendix 49 at Fourth Circuit, quoted in Respondents Brief in Opposition to Certiorari at p. 2.

[15] *Rowley*, 458 U.S. at 191.

[16] Joint Appendix 49 at Fourth Circuit, quoted in Respondents Brief in Opposition to Certiorari at p. 3. Even after Florence County finally did identify Shannon as learning disabled and proposed its first IEP for her, the school district evaluation used at the IEP meeting still described her learning problem as "one which is felt to have been acquired and fostered over a period of time in which (Shannon) did not apply the skills which she seems to possess." Further, the evaluator at that meeting indicated her problem was emotionally based and that she was not trying in the classroom. See Joint Appendix 363 at Fourth Circuit, quoted in Respondents Brief in Opposition to Certiorari at p. 3.

a learning disability.[17] The reason Florence County missed Shannon's disability in its first attempt at assessment is that for this important inquiry the school district used an unqualified examiner who did not meet state or federal standards required for the task.[18] That individual determined, for the public school district, that Shannon Carter was not learning disabled within the meaning of the IDEA.[19] Such a determination under the IDEA requires not only a properly credentialed examiner but also a multidisciplinary team[20], classroom observation,[21] and a written report.[22] In the instant case, the unqualified person conducting this inquiry worked alone rather than in a team,[23] did not conduct classroom observation,[24] and could not produce any evidence that there had ever been a written report.[25] Despite these deficiencies, the examiner was allowed to make the finding for the public school district

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[17] See note 13, *supra*.

[18] Joint Appendix at 3-4.

[19] There is no evidence that the school additionally considered at that time Shannon's potential eligibility for services under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which lists "specific learning disabilities" in its regulations at 34 C.F.R. § 104.3(j)(2)(i)(B) and requires special education and related services when determined appropriate. *Amici* are not raising this point originally in this Court at this late date for a substantive deliberation but simply mention it because of Florence County's insistence that the private school chosen by the parents did not meet all legal requirements. The evidence shows that Florence County itself ignored important requirements. Had the school used a qualified examiner under the IDEA and also inquired into the area of Section 504 eligibility, it might not only have discovered the learning disability but also the Attention Deficit Disorder and severe depression that substantially limited Shannon's ability to learn.

[20] 34 C.F.R. § 300.540.

[21] 34 C.F.R. § 300.542.

[22] 34 C.F.R. § 300.543.

[23] Joint Appendix, at 4.

[24] Joint Appendix, at 4.

[25] Joint Appendix, at 4.

that Shannon was not learning disabled and Florence County failed to address her unique educational needs.

When Shannon received her first thorough evaluation, from independent sources, the evaluators identified a number of Shannon's deficits, any one of which could confer eligibility for services under the IDEA. The evaluation showed that Shannon had a neurologically-based learning disability with severe visual perceptual problems, such a severe deficit in reading at the ninth grade level that she was functionally illiterate, severe attention deficit disorder with hyperactivity, major depression with suicidal thoughts, and such lowered self-esteem that she had basically given up on school.[26] Without the full evaluation required by federal law there is no way that the school district could propose a program that would be individualized, personalized, tailored and specially designed to meet Shannon's unique needs.

(2) Was The IEP Reasonably Calculated To Confer Benefit?

After the school district evaluated Shannon a second time, two years later, and identified her as eligible for specially designed instruction and related services, they met as a team with the parents to propose an IEP. The school district must propose what is actually needed by the student and not just what they have available.[27] Despite this requirement, Florence County limited the discussion to what they already had available for other students.

The school first proposed a "resource room" for two periods each day which contained seriously emotionally dis-

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[26] Joint Appendix, at 17-18.

[27] 34 C.F.R. Part 300, Appendix C, question and answer 44. As the most recent example of Congress' continuing insistence on this point, Congress stated in the IDEA amendments, in regard to the related service of social work, the school must "base the IEP recommendations on the individual student's need for social work services rather than on the perceived availability of such services." H. Rept. 101-544 at p. 7. Reprinted at 1990 U.S. Code Cong. & Admin. News 1729.

turbed and mentally retarded students.[28] The parents disagreed with that offer. The circuit court observed that there was no evidence that the school's proposal would have provided an appropriate education and, it is conceivable, according to the court, that the resource room might have been even less appropriate than other alternatives.[29]

The parents then inquired about itinerant learning disability services. The school response was a proposal of such services three times per week to be carried out during Shannon's classes in the regular classroom. The parents agreed to try that offering for the remaining weeks of the school year but judged it to be unsuccessful.[30] The district court ruled that this proposal also failed to satisfy the requirements of the IDEA as it was not reasonably calculated to confer benefit.[31]

The school district did not explore any further alternatives although many school districts would have considered, for a student like Shannon, a smaller class size with much more structure and intensive instruction for a longer part of the day than two class periods. That is, in fact, what independent experts who testified indicated that Shannon needed.[32] The public school district stated they have never offered any learning disability class like that in their school district because they had not been able to locate any personnel certified in learning disabilities to conduct the class.[33]

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[28] *Carter v. Florence County School District Four*, 950 F.2d 156, 158-59 (4th Cir. 1991). In a resource room offering the student would typically leave the regular classroom for a period and work on specific IEP goals in a smaller class size with a more structured environment. Shannon would spend one period concentrating on reading and another period concentrating on mathematics.

[29] *Carter*, 950 F.2d at 160.

[30] *Carter*, 950 F.2d at 159.

[31] *Carter*, 950 F.2d at 159.

[32] Joint Appendix at pp. 9, 21.

[33] Joint Appendix, at 6-7 and 25.

The goals that the school district set for Shannon on the proposed IEP were also found to be inappropriate. The school proposed an increase in reading by the end of one year of instruction from Shannon's current level of 5.4 (fifth year, fourth month) to 5.8 and an increase in mathematics from her current level of 6.4 to 6.8.[34] Since the school district's proposal would take 1.0 year of instruction to achieve that .4 growth, Shannon would in effect fall even further behind.

Both the district court and the circuit court found that this proposal was not reasonably calculated to confer benefit. The district court stated that the school district's proposed goal "ensured the program's inadequacy from its inception."[35] This goal setting is not just an idle exercise. It is a specific statutory requirement of the IDEA[36] which dictates the allocation of resources needed to meet such a goal.[37] If this severely learning disabled student were proposed for a full year's growth in reading and mathematics in one year of instruction, more resources would have to be allocated by the public school district than if the proposal were for merely .4 growth by the end of the year of instruction. The lower goal proposed by the school would allow them to expend fewer resources.

Thus the lower courts found the school district's goal setting and both alternative program offerings to fail the *Rowley* test: they were not reasonably calculated to confer benefit.

B. Did The Private Services Confer Benefit?

The IDEA provides parents with a choice when faced with this quandary: accept inappropriate services from the public school or procure appropriate services privately and seek reimbursement under *Burlington*. That is what Shan-

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[34] *Carter*, 950 F.2d at 159.

[35] *Carter*, 950 F.2d at 159.

[36] 20 U.S.C. § 1401(a)(20)(C).

[37] 34 C.F.R. 300. Appendix C, I (2)(a), (c), (d) and (e).

non's parents did, selecting the Trident Academy which specialized in severe learning disabilities. This Court described the situation perfectly in *Burlington*:

> In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.[38]

Thus, the *Burlington* analysis provides for a proper balancing of interests between school and parents. The public school district, under *Rowley*, is not required to offer the best program possible and does not have to spend its funds excessively for one student.[39] But it must at least meet the minimal definition of "appropriate" or risk having parents seek private services. On the other hand, if the parents feel that the public school offering is insufficient to confer an appropriate amount of benefit, then they can supplement it or replace it with private services and seek public reimbursement. When the court reviews the services

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[38] *Burlington*, 471 U.S. at 370.

[39] *Rowley*, 458 U.S. at 200.

purchased by the parents, the parents are at risk of losing their investment if they cannot show that the public school offering was inappropriate and that the privately procured services conferred benefit.

The key to determining whether to allow reimbursement is application of the *Rowley* standard: whether the school district's IEP was, or was not, reasonably calculated to confer benefit, coupled with the *Burlington* standard: whether the private services did, or did not, confer benefit.

What of the parents' choice of the private Trident Academy? Was *Burlington* satisfied? Did the private services confer benefit? Testimony showed that Shannon increased more than one year of growth in reading and in math for each of her three years of instruction at Trident.[40] In fact, there was evidence she finished the private program reading at the twelfth grade level.[41]

The public school says do not look at that outcome: focus instead on input criteria. The public school states that the Trident Academy could not provide an appropriate education because it did not meet state standards: it was not state approved. However, in South Carolina, there is a curious "catch 22." A program becomes state approved if the local school district asks for the placement at the private school.[42] Since Florence County totally opposed the placement at Trident Academy they did not ask for approval. Without state approval, Florence County argues, the placement does not meet state standards and the parents should not be reimbursed. Florence County further argues that two of the teachers at Trident Academy did not have South Carolina teaching certificates, and that the private school did not conduct traditional IEPs.[43]

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[40] *Carter*, 950 F.2d at 159.

[41] Joint Appendix, at 12.

[42] *Carter*, 950 F.2d at 161.

[43] *Carter*, 950 F.2d at 161. The IEPs were indeed not traditional: the court notes that student progress is measured, and IEP goals are revised, four times each year.

Shannon's placement could have been state approved had Florence County requested it. While Shannon was there, three other students at the Trident Academy were approved because their local districts had asked for approval, and South Carolina has never refused to approve a placement at the Trident Academy.[44] The Trident Academy failed to be state approved for Shannon not because it failed to meet state standards, but because Florence County kept it from being approved. Had the state approval process been invoked, the state would have had the duty to assure that any perceived defects (e.g., teacher certification, IEP forms) were brought up to state requirements.[45] Why can Florence County use an unqualified and unlicensed diagnostician but argue that Shannon's parents cannot be reimbursed for sending Shannon to a qualified although not state approved private placement?

The Trident Academy placement was "proper" under the Act within the meaning of *Burlington*.

II. THE PROSPECT OF A PUBLIC SCHOOL HAVING TO PAY FOR PRIVATE SERVICES IS NOT THE UNDUE BURDEN CLAIMED BY FLORENCE COUNTY AND THE AMICI CURIAE SUPPORTING PETITIONER'S POSITION.

First, the parent, not the school district, has the heavy burden. The only way that a public school would be forced to pay for privately procured educational services is if the parent can prove that the public program failed to meet the *Rowley* standard and that, per *Burlington*, the private services conferred benefit. As this Court noted in *Burlington*, the parent must be willing to risk the funds initially and secure the services of an attorney to pursue a judicial decision in the parents' favor. As noted in *Rowley* and *Burlington*, and as is obviously true in the instant case, these proceedings take years to conclude.[46] The bur-

[44] Joint Appendix, at 14.

[45] 20 U.S.C. § 1413(a)(4)(B), 34 C.F.R. § 300.400, 401(a)(1) and (3).

[46] *Burlington*, 471 U.S. at 370.

den of attacking the school district's appropriateness under *Rowley*, the burden of proof under *Burlington*, and the length of time that private services have to be funded[47] are substantial obstacles to parents attempting reimbursement.

Second, if the public school district complies with the IDEA and offers an appropriate program, it will not be responsible for the services that parents purchase unilaterally. If there is a dispute as to the appropriateness of the school district's offering, the school can consider alternatives that bring the school proposal up to the *Rowley* level, thus ending a parent's claim to reimbursement. This Court's *Rowley* standard is not insuperably high; it is generally considered a conservative standard. No public school should be able to refuse to come up to this standard and then claim that they should not have to pay for private services.

Third, the school district can prevent a multi-year claim building up for private services by annually offering a new IEP that would meet the *Rowley* standard. In *Burlington*, the circuit court noted:

> We think that pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law. . . Without an IEP as a starting point, the court is faced with a mere hypothesis of what the Town would have proposed and effectuated during subsequent years. . . *The continuation of the IEP process during the pendency of litigation may assist in promoting settlements. Also, subsequent IEPs that have not been appealed to the state agency may still provide useful evidence for the district court in fashioning 'appropriate' relief.* (emphasis added).[48]

[47] Shannon's parents began incurring these private expenses at the start of the 1985-86 school year.

[48] *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 794 (1st Cir. 1984).

Under this attempt at mitigation, the public school could have reviewed Shannon's progress at the private school, and the methodology that was proving successful, and offered to match it on a new IEP. If the court later found that the new IEP was reasonably calculated to confer benefit, the parents would not receive reimbursement after that public school proposal had been made.[49] A school that does not offer to revise the IEP and chooses to let the bill run up year after year should not complain later that the bill is too high.

Fourth, if the local school does not have the resources to offer an appropriate IEP they may notify the state education agency and ask that the state provide the services directly or through contract.[50] Congress contemplated that there will be small school districts with one or more children beyond their means to educate.[51] Rather than offering an inappropriate IEP because the local school district is unable[52] to meet the requirements of an appropriate program, Congress provided that statewide resources would be made available through the state education agency. In that way, there would be no undue burden faced by one lone school district.

Fifth, each local district is to annually prepare a local plan, under the comprehensive system of personnel development, which indicates their needs and their plan for meeting them.[53] This plan was referred to by this Court as ". . . a clear statutory directive. . . ."[54] After Shannon's evaluation, the local public school could have identified the need for a skilled teacher certified in learning disabilities who could operate an intensive small class size approach

[49] *Burlington*, 471 U.S. at 374.

[50] 20 U.S.C. § 1414(d).

[51] 20 U.S.C. §§ 1411(c)(4), 1413(b) and 1414(d).

[52] See 34 C.F.R. § 300.360(a)(3).

[53] 34 C.F.R. § 300.224.

[54] *Rowley*, 458 U.S. at 207.

and alerted the state, through the local plan application, that they needed state support in meeting this need.

Sixth, the state education agency, pursuant to its duties under the comprehensive system of personnel development,[55] should have identified this need on their own initiative. When the federal district court in the instant case found there were inadequate resources in the local public school district, the state should have exercised its initiative and inquired on its own to see if the local district required assistance to meet the statutory level of an appropriate offering for Shannon. This point was succinctly summarized by Judge Rambo in the recent case *Cordero by Bates v. Pennsylvania Department of Education*:[56]

> As defined by the IDEA, the state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring. The IDEA imposes on the state an overarching responsibility to ensure that the rights created by the statute are protected, regardless of the actions of local school districts. *Honig v. Doe*, 484 U.S. 305 (1988); *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 696-97 (3d Cir. 1981); *Lester H. v. Gilhool*, C.A. No. 86-6852, slip op. (E.D. Pa. Nov. 9, 1989), *aff'd*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); *Hendricks v. Gilhool*, 709 F. Supp. 1362, 1367-69 (E.D. Pa. 1989). The state must assure that in fact the requirements of the IDEA are being fulfilled. 20 U.S.C. § 1412(6); 34 C.F.R. § 300.600.
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> Accordingly, with regard to the state's liability in this action, the fact that local agencies are not performing up to par or that parents are not fulfilling their duties becomes irrelevant. It is the state's obligation to ensure that the systems it

[55] 20 U.S.C. § 1413(a)(3)(A), 34 C.F.R. § 300.380-383.

[56] 795 F. Supp. 1352 (M.D. Pa. 1992).

put in place are running properly and that if they are not, to correct them. This is the crux of the state's liability in this matter. . . .[57]

The IDEA requires that a state *assure* that . . . a practical method is developed and implemented to determine which children . . . are not currently receiving needed special education and related services." 20 U.S.C. § 1412(2)(C) (emphasis added); *see also* 34 C.F.R. § 300.128(a)(2). A state must, moreover, ensure through oversight that state and local agencies, including school districts, fulfill the dictates of the Act. 20 U.S.C. § 1412(6); *see also* 34 C.F.R. § 300.600. The Department of Education is further required, so that some weight is given to its oversight function, to adopt enforcement procedures "including sanctions." 34 C.F.R. § 300.575. If local districts are failing to fulfill their mandates under the IDEA and state law, the state is required to step in and provide such assistance directly. 20 U.S.C. § 1414(d); *see also Muth v. Central Bucks School Dist.*, 839 F.2d 113, 129 (3d Cir. 1988), *rev'd on other grounds*, 491 U.S. 223 (1989) (if children are not receiving appropriate education, "the state agency is required to provide that education by contract or otherwise."); *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 696-97 (3d Cir. 1981); *Battle v. Pennsylvania*, 629 F.2d 269, 278 (3d Cir. 1980); *Hendricks v. Gilhool*, 709 F. Supp. 1362, 1367-69 (E.D. Pa. 1989); *Wilson v. McDonald*, No. 85-506, slip. op. (E.D. Ky. May 15, 1987), *reprinted in* 1987-88 Education for the Handicapped Law Rep. 558:364 (July 31, 1987).[58]

If the state had upgraded the local school district's program, or had provided the needed services directly or

[57] *Cordero*, 795 F. Supp. at 1362.

[58] *Cordero*, 795 F. Supp. at 1360.

through contract, it would cut off any further claim for reimbursement from the parents.

Seventh, even when a public school is required to reimburse parents for private services, the courts have fashioned a standard that provides reasonableness. After this Court's ruling in *Burlington*, the Fifth Circuit Court of Appeals faced a request for reimbursement for private services.[59] That court recognized that fashioning appropriate relief was a balancing test and concluded:

> Factors that the court may consider in determining whether full or partial reimbursement is in order would include the existence of other, perhaps more suitable, substitute placements, the effort expended by Mrs. G. in securing alternative placements, and the general cooperative or uncooperative position of the school district itself. Hence, pursuant to *Burlington* we remand this issue to the district court to determine the appropriate amount of reimbursement due Mrs. G. under the particular circumstances of this case.[60]

With this approach, the local school can mitigate any claim against it, if it chooses to do so. If Florence County could point to a state approved school that was available to Shannon, or could point to a school close enough to the parents' home so that boarding costs would not be necessary, or could point to an appropriate school that was less expensive than the Trident Academy, then a court determining the appropriate amount of reimbursement would likely cap the amount of reimbursement at the lower level. However, if the Trident Academy is the only appropriate school the parents could find and no alternatives were being suggested by Florence County, one could expect the type of reimbursement awarded by the district court and affirmed by the Fourth Circuit.[61]

[59] *Alamo Heights v. State Board of Educ.*, 790 F.2d 1153 (5th Cir. 1986).

[60] *Alamo Heights*, 790 F.2d at 1161.

[61] *Carter*, 950 F.2d at 164-65.

The school district in this case should not be allowed to propose an inappropriate program, leave the parents to seek other services, refuse to revise their program offering for three years, not notify the state of their needs, not avail themselves of any of the means to mitigate costs, and then complain about the amount of the reimbursement awarded.

CONCLUSION

This Court in *Rowley* and in *Burlington*, and other courts interpreting those decisions, have given ample guidance to public school districts in regard to the standard they must meet in making an appropriate offering under the Act. Meeting those standards is not an undue burden on the public schools. When a public school fails to meet this burden, it should not be able to block a parent who must turn to private services to enable their child to receive the appropriate program offering Congress intended.

For the above-cited reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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